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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 61.

THE GRAND RAPIDS & INDIANA RAILWAY COMPANY,
Plaintiff in Error,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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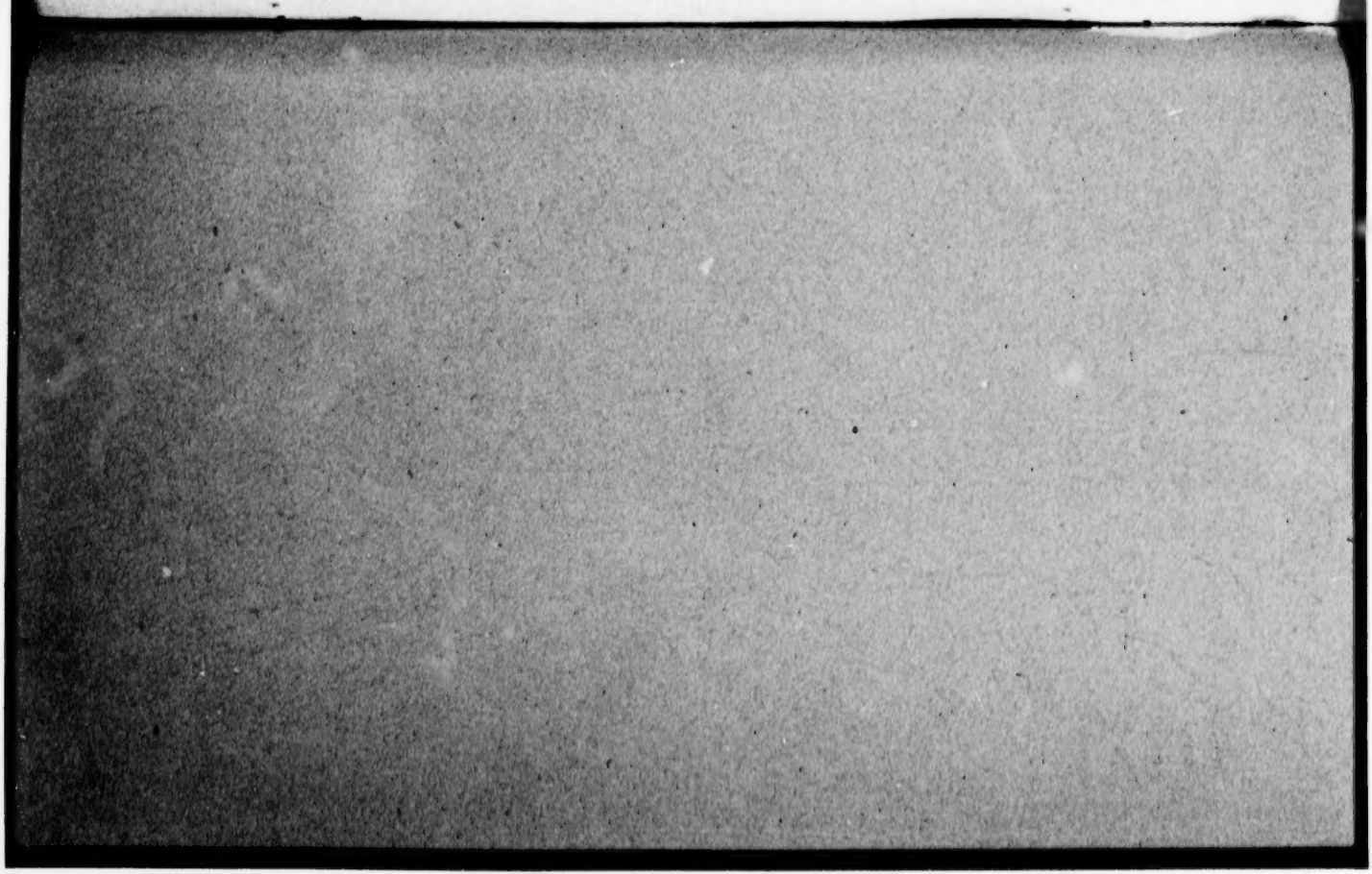

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STATEMENT.

1. The Grand Rapids & Indiana Railway Company, appellant in this case, was organized on July 11, 1896, by one John C. Sims, and others, under and pursuant to the provisions of the general railroad law of the State of Michigan,

being Act No. 198 of the Public Acts of the State of Michigan for 1873 and the several amendments thereto; and the purposes of the organization were: first, to own, maintain and operate the railroad running from Mackinaw City, Michigan, to Fort Wayne, Indiana, previously constructed and owned by the Grand Rapids & Indiana Rail*road* Company; and second, to take over, maintain and operate various leased lines which the Grand Rapids & Indiana Rail*road* Company has held and operated as lessee.

2. Prior to the organization of the respondent company, the Grand Rapids & Indiana Rail*road* Company has issued two sets of mortgage bonds; the first dated October 1, 1869, and amounting to $5,375,000, and the second, August 1, 1884, and amounting to $3,000,000.

3. In or about the year 1896 the mortgage given to secure the second series of bonds was foreclosed by proceedings instituted in the Circuit Court of the United States for the Western District of Michigan and the District of Indiana, and, on June 10, 1896, a sale of the property of the company had. John C. Sims became the purchaser upon this sale for the sum of $500,000, his title being subject to the underlying first mortgage bonds.

4. The general railroad incorporation law of the State of Michigan above referred to contained the following provision, viz.:

> "In case of the foreclosure and sale of any railroad, or part of any railroad, under any trust deed, or mortgage given to secure the payment of bonds sold to aid in its construction and equipment, or for other cause authorized by law, it shall be competent and lawful for the parties who may become the purchasers, and such others as they may associate with themselves, to organize a corporation for the man-

agement of the same, and issue stock in the same in shares of one hundred dollars each, to represent the property in said railroad; and such corporation when organized shall have the same rights, powers, and privileges as are or may be secured to the original company whose property may have been sold under and by virtue of such mortgage or trust deed. Such organization may be formed by virtue of a declaration or certificate of the purchasers at the sale under said mortgage or trust deed, which shall set forth the description of the property sold, and the date of the deed under which it was sold, or of the decree of the proper court, if it shall have been sold by virtue of a decree of any court; and with such description of the parties to the deed or suit as may identify the one or the other, or both; the time of the sale, and the name of the officer who sold the same; and also the purchasers, and the amount paid, and the stockholders to whom stock is to be issued, and the amount of the capital stock and the name of the new corporation, and such other statements as may be found requisite to make definite the corporation whose property may have been sold, and the property sold as well as the extents and rights and property of the new company; which said certificate or declaration shall be signed by all of the said purchasers, and shall be addressed to the Secretary of State; and being filed and recorded in his office, the said corporation shall become complete, with all the powers and rights secured to railroad companies under this act, *to all the provisions of which, and amendments thereto, it shall be subject,* and a certified copy of the said certificate or declaration shall be *prima facie* evidence of the due organization of said company."

Sec. 2, Art. I, Act 198, P. A. 1873.

It was under this provision that Mr. Sims and his associates organized the Grand Rapids & Indiana Railway Company in June of 1896.

5. Among the amendments to Act 198, P. A. 1873, above referred to, to which the newly organized company *became subject*, was the following:

ARTICLE II.

* * * * * *

"Sec. 9. Every such corporation shall possess the general powers *and be subject to the liabilities and restrictions following*: that is to say:

* * * * * *

Ninth, To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz.: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the Commissioner of Railroads for the year one thousand eight hundred and eighty-eight, equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile, and for all companies, the earnings of whose passenger trains reported as aforesaid, were over two thousand and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said

company, three cents per mile: *Provided, That in future, whenever the earnings of any company doing business in this State, as reported to the Commissioner of Railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand* or three thousand dollars per mile of road operated by said company, *then in such case said companies shall thereafter, upon the notification of the Commissioner of Railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half*, or two cents per mile, *as hereinbefore provided:* Provided, That roads in the Upper Peninsula, which report as above provided, passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile."

The above provision was incorporated in the general railroad law by an amendment made in 1889. (P. A. No. 202.) Previous to 1889 it may be said that a rate of three cents per mile for the carriage of passengers had been the customary maximum rate.

6. Under the provisions of the general railroad law above quoted, the respondent company reported annually to the Commissioner of Railroads the earnings of its passenger trains for each mile of road operated by it, and its report for the year ending December 31, 1900, showed that the total earnings of its passenger trains in the State of Michigan for said year was $976,843.87, and that for each mile of road operated the earnings amounted to the sum of $2,243.24. In previous years the earnings per mile had been reported as less than $2,000, and the company had charged for passenger fares the rate of three cents per mile.

It may also be stated that in accordance with the construction placed upon this law by the Commissioner of Railroads and sanctioned by the State Supreme Court, the passenger earnings reported, from which the earnings per mile in Michigan was computed, consisted, first, of the purely domestic or State earnings where passage commenced and ended in the State, and second such proportion of the interstate earnings as represented the ratio which the mileage of road operated in Michigan, bore to the entire mileage. The total of these two was divided by the Michigan mileage to get the earnings per mile which the statute contemplated as the measure to determine the maximum rate of fare permissible.

It may further be noted that under the construction of the law sanctioned by the Supreme Court of the State of Michigan, there are included in these earnings which are reduced to a mileage basis, moneys received on account of express, baggage, mail and other services appertaining to passenger trains and the passenger business of the road.

7. The respondent company, by reason of its passenger earnings having increased so as to exceed the sum of two thousand dollars per mile, but being still less than $3,000 per mile passed at the end of the year 1900 into the two and one-half cent class, and, on July 11, 1901, the relator who then occupied the position of Commissioner of Railroads, gave the notice requisite under the statute to require it to thereafter only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half per mile.

8. The respondent company refused to comply with this order, and the Commissioner filed in the Circuit Court for the County of Kent, a petition for a writ of mandamus to compel obedience to the order. His petition set up the essential facts necessary to the stating of his case. An order

was made to require the respondent to show cause why the writ should not be granted, and was duly served.

9. Respondent filed an answer to relator's petition, showing cause why the writ should not issue. The matters herein previously stated were set forth, and four points were made which may be summarized as follows:

First. It alleged that the reduction of passenger fares from three to two and one-half cents per mile would deprive it of a reasonable compensation for the services to be performed, and that the operation of the law enforcing the reduction would deprive it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Second. Inasmuch as the Supreme Court of the State of Michigan in the case of Wellman vs. Chicago and Grand Trunk Railway Company, 83 Mich. 592, had construed those portions of the ninth subdivision of Article II of the general railroad act of Michigan, to be a fixed and conclusive determination of passenger rates by the legislature of the State into the reasonableness or unreasonableness of which, as affecting the earning power of the railroads made subject thereto, the courts were precluded from inquiring, it claimed that the provision requiring a reduction of passenger fares was unconstitutional and void, for the reason that railroad companies made subject thereto are denied the right to a judicial determination of the reasonableness of the rates imposed, and without which right the law would violate the Fourteenth Amendment of the Constitution of the United States in the clause that forbids the taking of property without due process of law.

Third. That the provision of law in question provides for an arbitrary and unequal classification of rates of passenger fares and violates the provision of the Constitution of the United States found in the Fourteenth Amendment, which inhibits the States from denying to persons within their jurisdiction the equal protection of the laws.

Fourth. It claimed that because the legislation in question had predicated the reduction of rates of fare partially upon the amount of interstate passenger earnings received by a railroad company, that the provision operated as a regulation of commerce among States, and consequently was in conflict with the provision of the Constitution of the United States restricting such power to Congress.

10. On the coming in of this answer, relator filed a demurrer thereto, which in substance alleged that, inasmuch as the scale of passenger rates permissible and the conditions of their reduction were a part of the act under which respondent had been incorporated in 1896, it could not be permitted to question the operation of the law to which it owed its creation.

11. On demurrer the case was heard in the Circuit Court. The demurrer was sustained, and the writ ordered to be issued.

12. Respondent took the case by writ of certiorari to the Supreme Court of the State, and upon hearing the judgment of the Circuit Court was affirmed.

13. The case comes to the United States Supreme Court on writ of error, the assignments of error amounting practically to this single contention, viz.:

That the fact of incorporation in 1896, under the act in question and under the circumstances set forth in its answer cannot be held to deprive respondent of its right to the protection guaranteed under the provisions of the Constitution of the United States invoked in its answer.

It is to this issue that this brief is chiefly directed, although appellee does not concede that the Supreme Court of Michigan passed upon a Federal question in rendering its judgment, and a portion of the brief is devoted to that proposition.

ARGUMENT.

The provisions of the fourteenth amendment to the constitution of the United States invoked by appellant authorize no interference with the operation of rates or schedules established by railway charters or incorporation laws in cases where the corporation complaining accepted the charter or voluntarily organized under the act establishing the rate or schedule.

The appellant has invoked two provisions of the Fourteenth Amendment to the Constitution of the United States to relieve it from the operation of the railway incorporation law under which it is organized and under which, unless these provisions inhibit, it has become liable to reduce its Michigan passenger rates from three to two and one-half cents per mile, viz.:

First. The provision of Article XIV, Section I of the Amendments to the Constitution which provides that no State shall deprive any person of property without due process of law;

Second. The further provision of Article XIV, Section I of the Amendments, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Taking up the first of the provisions mentioned, this point is made regarding the class of State acts that have been relieved against.

No instance has been found by appellee where, by virtue of the provision of the Constitution of the United States inhibiting a State from depriving any person of property without due process of law, a railroad or other corporation has been granted relief from obedience to its charter or organic act.

Uniformly it will appear in adjudicated cases that redress has been sought against obligations or restrictions attempted

to be imposed upon corporations already created, through amendments to their charters or by general laws of subsequent enactment, designed to be enforced regardless of the will or assent of the corporation affected, and the operation of which is claimed will or does deprive the corporation of its property or its reasonable earnings.

It would be a work of supererogation to demonstrate this proposition by reference to the adjudicated cases. The principle is too well understood and too self evident to require the reference.

Whether or not railways shall be chartered or incorporated at all, is a matter of public policy solely for legislative determination. Whether the terms of incorporation to be offered shall be advantageous or disadvantageous to those who may wish to incorporate, is equally a matter of public policy. They are free to accept or refuse as their interests may dictate. The benefits and burdens of the incorporation law are susceptible of ascertainment and measurement before acceptance thereof or action thereon.

Hence it is that they who incorporate are bound by the terms of their charter or incorporation law. The constitutional provision under consideration was not intended to operate as a bankruptcy provision against improvident contracts nor to relieve from a diminution of property and earnings through the operation of State laws to which the owner of the property had assented.

The principle is forcibly put in the case of San Diego Land and Town Company vs. City of National City, 74 Fed. Rep. 79, in which the complainant company sought to have held invalid as violative of the provision of the United States Constitution under consideration, a provision of the Constitution of California and an act thereunder under which the complainant had acquired its property and rights. The Court says:

> "In the present case the complainant came into the State of California, and acquired the water and water

> rights which form the basis of its suit under and by virtue of laws passed pursuant to that provision of the Constitution of the State which it now seeks to assail as being contrary to the provisions of the Constitution of the United States. To permit the complainant to do this would, in effect, be to permit it to rely upon the Constitution and laws of California, as a valid basis for the acquisition of its asserted rights, and at the same time to treat as void the same provisions, where they impose a burden in connection with those rights. The complainant cannot be permitted to thus blow hot and cold in the same breath. If it was not willing to subject itself to the burden imposed by the Constitution and laws of California upon all persons and corporations appropriating water in the State for distribution and sale, it should not have come, as it did, into the State, and availed itself of the rights of appropriation conferred by the same Constitution and laws. Taking those benefits, it assumed the corresponding burdens, and will not be heard to assert the one and repudiate the other." (74 Fed. Rep. 81.)

It may be said, however, in respect to the case cited that the right to have relief from unreasonable water rates fixed by the officers provided for in the act in question was sustained. But had those rates been fixed in the organic act itself as in the Michigan railroad law the principal to be found in the quotation would have debarred further inquiry or redress. If in the Michigan law discretionary power was vested in the Commissioner of Railroads to determine when a rate should be reduced, the Constitutional provision might possibly be invoked against his action if his reduction deprived the railroad affected of reasonable earnings.

But where the bargain was made that railroad organization might be had if the company should agree that its future rates of fare might be fixed by reference to its own reports

of facts, with absolutely nothing left to the discretion of the officer who is charged with the enforcement of the law, the operation of the law is made binding upon the railroad company by the act of organizing under the law. The diminution of property occasioned by the operation of the law is by its own consent. The Constitutional provision invoked is entirely inapplicable. An application of the principal here invoked is to be found in the case of Dow vs. Electric Company (N. H.) 31 Atl. Rep. 22, which was reviewed in this Court (166 U. S. 489).

In this case the electric company under the laws of New Hampshire was given authority to institute condemnation proceedings. A condition of the exercise of the right expressed in the law was that 50 per cent should be added to the award of the jury. The company instituted the proceedings and obtained the award of the jury, but objected to the adding of the 50 per cent, on the ground that the provision that authorized it was in contravention of the Constitution of the United States.

The New Hampshire Court says:

"When a legislative grant of authority to exercise the power of eminent domain contains a condition that the grantee shall pay more than the value of the property taken under the power, *the grantee accepting the grant and exercising the power cannot question the constitutionality of the condition.* * * * The statute is permissive. It confers a privilege which the defendants were at liberty to exercise or not, as they saw fit. But they cannot take and enjoy the benefit without performing the condition on which it is given. By their exercise of the power conferred, flowing the plaintiff's land, and applying for an assessment of the damages, they are precluded from denying the validity of the condition. *The question of its constitutionality under either the Federal or State Constitution is not open to them.* Pitkin vs.

City of Springfield, 112 Mass. 509; Deverson vs. Railroad Company, 58 N. H. 129, 131, and cases cited; Dodge vs. Stickney, 61 N. H. 607, 610, 611; People vs. Murray, 5 Hill. 468, 472. The defendants objection that the statute is in conflict with both constitutions or either of them is overruled." (31 Atl. Rep. 23.)

The United States Supreme Court in passing upon the case says:

"We agree with the Supreme Court of New Hampshire in thinking that the plaintiff in error, by availing itself of the power conferred by the statute, and joining in a trial for the assessment of the damages, is precluded from denying the validity of that provision which prescribes that fifty per cent shall be added to the amount of the verdict. The act confers a privilege, which the plaintiff in error was at liberty to exercise or not, as it thought fit." (166 U. S. 490.)

2. The feature of the Michigan railroad law, which provides for the graduation of rates of fare for the carriage of passengers by the per mile passenger earnings of the roads subject to the act, is attacked by respondent as violative of the provision of the Constitution of the United States, which inhibits a State from denying to any person within its jurisdiction the equal protection of the laws.

The classification that the State has thus made is attacked as arbitrary and neither just nor reasonable, and its operation is impugned as resulting in unequal privileges to different corporations that in justice should be on the same basis.

But in reviewing the cases where classifications made by or through State authority have been attacked as violative of the constitutional provision under consideration, the same fact appears that did in the cases arising upon the application of the provision regarding the deprivation of property

without due process of law. None of the classifications that have been declared arbitrary and unreasonable and violative of the constitutional provision have been classifications found in the laws authorizing the creation of corporations. They have been found either in laws designed to impose burdens other than those found in charters or organic acts and voluntarily assumed by incorporation thereunder.

It certainly cannot be claimed that a State is bound by this constitutional provision to extend the same terms to each and every corporation that it may see fit to create. If so the right of a State to grant special charters was annihilated by the adoption of the Fourteenth Amendment. Justice Brewer in a dissenting opinion rendered in the case of Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283, 302, 300, in which was under consideration, the right to graduate the inheritance tax upon legacies to strangers to the estate, states the principle here contended for. He says:

> "There are doubtless some matters over which the State has purely arbitrary power. For instance, it is under no obligation to grant any charters, and the legislature may undoubtedly, in giving a charter to one set of persons impose one series of burdens, and in granting a similar charter to another set may impose entirely different burdens. But these are cases of mere gratuities, mere favors and privileges, and any donor of such may add to them the burden he pleases." (170 U. S. 302.)

The statement as relates to the case decided was dictum, but its authority is in no wise weakened by the majority opinion of the court. The proposition is incontrovertible.

The possible unequal operation of the Michigan railroad law was apparent after the incorporation of the provision complained of in 1889. It must have been known by those who wished to incorporate thereunder that their rates of passenger fare might be more or less than others who had

or should incorporate under the act, dependent upon the amount of their passenger earnings. If they deemed the possible discriminations not to be based upon rational grounds, they were free not to come under the act. They assent to the unequal burdens imposed by the law if they come under it. For the respondent to now be permitted to complain of the terms of the act under which it voluntarily organized and to invoke against the enforcement of its obligations the Constitutional provision now under consideration would logically sanction the denial of any contract because some one else had been permitted to contract on more favorable terms. The purpose, the scope and the intent of the Constitutional provision applies and is intended to apply to no such conditions as here exist.

The argument upon this point thus far has assumed that the graduation of passenger fares contained in the railroad incorporation law of Michigan is upon an arbitrary basis, and that in its operation it may result in unequal privileges and arbitrary discriminations. The assumption, however, is unwarranted if the actual terms of the act are examined and considered.

The graduation of passenger fares by the amount of passenger earnings is both just and reasonable. The classification rests upon a difference which bears a reasonable and just relation to the act in respect to which the classification is made. There is equality between the classes created.

The operation of the law is exactly the same as a graduated inheritance tax, with the tax at a greater rate for such portions of the inheritance as exceed a certain amount. The value of the franchise to charge for the transportation of passengers is measured by the number of passengers traveling or the number of fares received. As the total of earnings increase fares are required to be lowered, and thus a greater amount compelled to be yielded up by the railroads for the benefit of the public. As in the inheritance tax, the greater the benefit the greater the burden imposed.

The law laid down by the majority of this court in the

case of Magoun vs. Illinois Trust & Savings Bank above quoted, is applicable to the case at bar. The court says:

> "The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality, nevertheless they are universally imposed and their legality has never been questioned. We think the classification of the Illinois law was in the power of the legislature to make, and the decree of the Circuit Court is affirmed." (170 U. S. 300.)

II.

The commerce clause of the United States constitution is not infringed by the provisions of the Michigan railroad law providing for the adjustment of passenger rates.

Thus far has been considered the claim of the respondent that its rights guaranteed under the Fourteenth Amendment to the Constitution of the United States have been violated. The answer has been that these rights were personal and were subject to voluntary waiver, and that the

acceptance of privileges conferred by an act of incorporation by organizing thereunder, was a waiver of and operated as an estoppel against an appeal to the protection of these constitutional provisions.

It must be admitted, however, that the commerce clause is of an entirely different character from the Fourteenth Amendment. It is an allotment of governmental power, a statement of a division between Federal and State jurisdiction and authority. The doctrine of estoppel cannot be held to have the same force in cases where this provision of the Constitution is invoked.

It is not contended in this brief that, if a State prescribed or sought to prescribe, as a condition for the creation or existence of a corporation designed to engage in commerce between the States, that it should not be subject to the laws of Congress as respects such commerce or that it must act in violation of such laws, there would be any question, but that the courts would hold the authority of Congress paramount.

Whether or not a corporation that had accepted such a questionable commission as a part of its charter or oganic law, could, in a dispute solely between itself and the State that created it, allege the invalidity of any part of its charter, may admit of doubt; but certain it is, that before it could avail itself of such a defense it would have to show conclusively that the provision objected to did infringe upon the legitimate powers of the paramount sovereignty.

Let us consider, therefore, the effect upon State authority of this commerce clause found in the Constitution of the United States.

In the case of Covington and Cincinnati Bridge Company vs. Commonwealth of Kentucky, 154 U. S. 204, Justice Brown, in reviewing the adjudications of the United States Supreme Court with respect to the power of the States over the general subject of commerce, divides them into three classes, viz.: First, those in which the power of the State is held to be exclusive; second, those in which the

States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive, and the States cannot interfere at all.

Under the first class he enumerates the power to authorize the construction of highways, turnpikes, railways and canals between points in the same State, and to regulate the tolls for the use of the same.

The commerce clause by its terms excludes commerce entirely within a single State, and without statement of authorities it may be said that a State has undoubted and exclusive authority; first, to create corporations to engage in domestic or intra-State commerce; second, to prescribe such rates of toll for the carriage of such commerce as it may see fit, either by the terms of the original charter or incorporation act, or by amendment thereof, if the right to amend is reserved to the State. The only limitation upon the authority is that the right of amendment shall not be unreasonably exercised.

But that States have and may lawfully exercise powers that in a measure affect commerce between the States, either through the non-action or the concurrence of Congress, is manifest by reference to the cases and instances cited by Justice Brown in the enumeration of cases under his second class above referred to. One instance of the exercise of powers by the State he does not refer to as fully as might be. That is the power of the State to create corporations to engage in the business of interstate commerce. Congress has chartered one or two railroad companies under exceptional circumstances, and numerous bridge companies to build bridges over navigable streams that form State boundaries. But the great bulk of corporations chartered or organized to carry on commerce intra-State and interstate, owe their origin to State authority. Railroads are often incorporated in one State to extend into some other or several other States and extra territorial effect is given to the law under which they were created by the acquiescence of the other State or by the operation of State comity; or by con-

current laws the corporation is given equal life and equal powers in separate sovereignties. Congress has never denied to the States this right and until it does deny the right, by itself assuming it or by prohibiting it to the States, the right of the latter cannot well be challenged.

But as incident to this undoubted power to create corporations to engage in interstate commerce, does the State have authority in the charter or by the terms of the incorporation acts to prescribe the terms and conditions upon which such commerce shall be engaged in; or to be more specific, can they say to a corporation thus to be created, "you may not have the benefit of this incorporation act unless you engage to carry at certain rates the commerce which we will give you authority to carry."

Upon this proposition the following authorities are advanced:

Camden & Amboy Railroad & Transportation Company vs. Briggs, 22 N. J. L., 623, 651.

Railroad Company vs. Maryland, 21 Wallace, (88 U. S.) 456-473.

Covington & Cincinnati Bridge Company vs. Kentucky, 154 U. S. 204, 223.

In the case of Camden & Amboy Co. vs. Briggs, the company was chartered by the legislature of New Jersey to perfect an expeditious and complete line of communication between New York City and Philadelphia. To facilitate the objects of the act it was authorized to construct a railroad from the Delaware river to a opint on Raritan Bay. It was required to provide suitable vessels at either extremity of the road for the transportation of passengers and produce from city to city. It was limited to its charges for freight and pas-

sengers. The charter granted powers to do acts outside the State, and the limitations as to charges was held applicable to the entire route. The court says:

> "But it is objected that the granting this power, and the restrictions thereon to operate upon the water as well as upon the land, is an interference with the Constitution as expounded by the Supreme Court in Gibbons vs. Ogden, 9 Wheat. 1. * * * But it was never pretended in that case that a State legislature could not charter a company to navigate the waters in any State, or even the ocean itself. If the company seek the protection and security of a State charter, they are bound, as a company, by the restrictions and penalties of that charter, and of the the legislature that grant it, though any individual member of the company may exercise the right of a citizen, and do the same thing on his own responsibility without restriction; and this in no way interferes with the Constitution or the exclusive powers of Congress; it is no restriction of commerce or of the rights of individuals; no exclusive grant or prohibitory use of the waters within or without the State; no imposition of taxes, duties, imposts or excises on vessels, or the cargos thereof, but simply a power granted to a corporation, and a restriction thereon by the granting power; not intended to operate on the persons of individuals, or their vessels or property, but simply on the corporation itself, on whom is conferred the right, imposed the duty, and is added the restriction. An individual, it has been urged, may do the same things unrestricted, for the waters are free. True, but when a company of individuals ask of a State a portion of its sovereign power to enable them, by land and water, to complete a line of communication between New York and Philadelphia, and to do this not under their individual

> names and responsibilites, but like a sovereign, with its capacity to act under its own seal in its corporate name, they cannot complain if the State that grants them this shall add all proper restrictions. It is no more than is constantly done to the various pilot companies, steam navigation companies, whaling companies and others chartered by State legislatures." (22 N. J. L. 651-652.)

This case unhesitatingly affirms the doctrine here contended for that as incident to the power to create corporations is the power to prescribe the terms and conditions upon which they shall exist, and the principle is applied to a corporation chartered by a State to engage in the business of interstate commerce and the regulation is of rates of charges that might be made for interstate commerce business.

The case of Railroad Company vs. Maryland approaches the proposition more closely and with greater authority. The State of Maryland chartered the Baltimore & Ohio Railroad Company, and authorized it to construct its line from Baltimore to a point outside the State, viz., to Washington in the District of Columbia. Congress granted permission for the road to enter the District. The maximum charge for the carriage of passengers between Baltimore and Washington was fixed in the charter, and it was also therein provided that the company should semi-annually pay to the State one-fifth of the amount received for the transportation of passengers during the preceding six months. The company resisted payment of this charge upon the ground that the condition for payment provided for in the charter was invalid because violative of the Constitution of the United States, and that it was not estopped from setting up the defense. Justice Bradley, in delivering the opinion of the court, uses this language:

> "What amounts to a regulation of commerce between the States, or to a discrimination against

the citizens of other States? This is often difficult to determine. In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises, and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts. It is not within the category of such acts. It may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The State is conceded to possess the power to tax its corporations, and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So the State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro;* and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more or less than a bonus; and so long as the rates of transportation are entirely discretionary with the States, such a stipulation is clearly within their reserve powers." (21 Wallace (88 U. S.) 473.)

The case of Covington Bridge Company vs. Commonwealth of Kentucky, may also be claimed as an authority upon the same subject, at least that part of the decision which states the ground of the concurrence of the Chief Justice and three associate justices in the opinion of the court. They say as follows:

"By the concurrent acts of the legislature of Kentucky in 1846, and of the legislature of the State of Ohio in 1849, this bridge company was made a cor-

> poration of each State, and authorized to fix rates of toll. Congress, by the act of February 17, 1865, c. 39, declared this bridge 'to be, when completed, in accordance with the laws of the States of Ohio and Kentucky, a lawful structure,' but made no provision as to tolls and thereby manifested the intention of Congress, that the rates of toll should be as established by the two States." (154 U. S. 223.)

This excerpt from the decision admirably illustrates the point that is here sought to be made, namely, that in the plenary power of a State or two or more States, by concurrent action to create interstate commerce corporations is included power to establish as a condition of incorporation the rates for the carriage of such commerce in such State or States, provided the intention of Congress not to interfere with the exercise of such power is made manifest.

It should be noted that the power to regulate rates is only claimed as incident to the granting of a charter or the passage of an incorporation act where acceptance by the corporation of the charter conditions is a prerequisite to incorporation. It should also be noted that no extra-territorial effect is sought to be given to the charter. The limitations are upon interstate commerce within the State granting the charter or the States concurring in its terms. And finally it is to be observed that the authority is to be exercised only on the express or implied consent of Congress.

With the limitations of the claim here made thus defined, the cases which have denied to the States authority to prescribe or regulate tariffs or fares for interstate commerce may be distinguished.

The case of the Wabash, St. Louis and Pacific Railway Company vs. Illinois, 118 U. S. 557, may be taken as representative. The court did not have under consideration in that case provisions of a charter or incorporation act to which the railroad company had given assent, but to regulations subsequently imposed by general law which were re-

sisted on the ground that the road's interstate commerce was not within the jurisdiction of State legislation. In the case we have in mind jurisdiction is predicated primarily upon the consent of the corporation to the State's action, and for that reason the Wabash case cannot be held to decide the point here made.

Justice Bradley, in the dissenting opinion filed in this case, to which the Chief Justice and Justice Gray gave assent, very forcibly states the distinction herein sought to be made. He says:

> "Now, since every railroad may be, and generally is, a medium of transportation for interstate commerce, and affects that commerce, and since the charges of fare and freight for such transportation affect and incidentally regulate that commerce; and since the railroad could not be built, and the charges upon it could not be exacted, without authority from the State,—it follows, as a necessary consequence, that the State, in the exercise of its undoubted functions and sovereignty, does, in the establishment and regulation of railroads, to a certain and a very material extent, not only do that which affects, but incidentally regulates, commerce. It does so by the very act of authorizing the construction of railroads, and the collection of fares and freights thereon. No one doubts its power to do this. The very being of the plaintiffs in error, the very existence of their railroad, the very power they exercise of charging fares and freights, are all derived from the State. And yet, according to the argument of the plaintiffs in error, pursued to its legitimate consequences, the act of the State in doing all this ought to be regarded as null and void because it operates as a regulation of commerce among the States. Not only does the right to charge fares and freights at all come to a railroad company from the grant of the State, but

the amount of such charges is also regulated by the State law, either by the charter of the company, or by legislative regulations, or by the general law that the charges shall be reasonable; and that is State law, and not United States law. Where else but from the laws of the State does the railroad company get its right to charge any fares or freight at all? And since its being, its franchises, its powers, its road, its right to charge, all come from the State, and are the creation of State law, how can it be contended that the State has no power of regulation over those charges, and over the conduct of the company in the transaction of its business, while acting within the State and using its railroad lying within the bounds of the State? *Omne majus continet in se minus.* If the State created the company and its franchises, it surely may make regulations as to the manner of using them.

It is evident from what has been said that the dealing of a State with a railroad corporation of its own creation, in authorizing the construction and maintenance of its road, and the charge of fares and freights thereon, is, in its purpose, a matter entirely aside from that kind of regulation of commerce which is obnoxious to the provisions of the constitution. There is not a particle of doubt that it was the right of the State to prescribe the route of the plaintiff's road,—it might be in a direction north and south, or east and west; it might be by one town, or by a different town. It was its right to prescribe how the road should be built; what means of locomotion should be used on it; how fast the trains might run; at what stations they should stop. It was its right to prescribe its charges, and to declare that they should be uniform, or, if not uniform, how otherwise. This certainly was the right of the State at the inception

of the charter, and every one of these things would most materially affect commerce, not only internal, but external; and yet not one of them would be repugnant to the power of congress to regulate commerce within the meaning of the Constitution.

Suppose the original charter of the railroad company in this case had contained precisely the provision against discriminating charges which is contained in the general law now complained of, could the company disregard the conditions of its charter, and defy the authority of the State? We think it clear that it could not." (118 U. S. 586-588.)

So far as we have been able to find, no case has approached nearer to the facts of the case at bar than the Wabash case, and hence it is needless to refer in detail to other cases of the class of which it stands representative. The case at bar presents the identical proposition which Justice Bradley cites in the last paragraph above quoted and the question here raised is whether the decision in the Wabash case rules the case which he cites by way of illustrative argument.

Since the Wabash case the Interstate Commerce law has been passed, and a necessary inquiry in this brief must be whether the terms of that act inhibits States by single or by concurrent acts from creating corporations to engage in interstate commerce or prescribing in their charters or incorporation acts the rates that may be charged therefor. It will hardly be contended that the right of States to organize commerce corporations is in anywise affected by this act of Congress. It may be doubted whether it remains longer in the power of a State by collusion with a corporation that it may organize to establish rates for interstate commerce that would be unreasonable or unjust as against the public. Congress has not itself sought to establish rates for this commerce nor has it granted authority to any body or board of its creation so to do. Its failure thus to do evidences an

intent not to interfere with any power previously exercised by the States. It only guards against extortionate charges in whatever form or by whatever authority imposed.

Taking up the Michigan statute under which the respondent company has been organized and the terms of which it agreed to conform to, it now objects to that provision which says that when the earnings of its passenger trains shall equal or exceed $2,000 per mile it shall reduce its passenger fares from three to two and one-half cents per mile. The act does not specify whether the reduction shall relate only to Michigan trips or is intended to include the Michigan portion of interstate trips. It does relate however, only to travel in Michigan and to charges to be made for travel in Michigan.

It will be conceded that in one case the Supreme Court of the State of Michigan in applying the provision to the Wabash Railroad which runs for a distance of ninety miles or thereabouts in Michigan, compelled the reduction only for trips originating and ending in the State.

Commissioner of Railroads vs. Wabash Railroad Company, 126 Mich. 113.

In that case, however, no claim was made that the Wabash Company had assented to the provisions of the act here in question by organizing thereunder at a time when the provision constituted a part of the act. The court therefore applied the act only to that class of fares over which the legislature of the State had jurisdiction irrespective of the element of consent.

The order which was made by the Circuit and Supreme Court in this case has followed the language of the statute, and by its terms applies to all passenger travel in Michigan. The claim is here made for the application of the order according to the assent of the respondent company. If that

assent cannot be held to relate to such portion of interstate travel upon respondent's road as is had in Michigan, it is conceded that the order should apply only to travel originating and ending in the State.

To an order in the latter form the only objection urged by respondent, outside of the possible unreasonableness of the rate imposed by the statute, is that the commerce clause of the Constitution is violated in the fact that the Michigan proportion of interstate fares is by the terms of and the practice under the act, included in the earnings per mile upon which the rate of fare is made to depend.

The same question was raised in the case of Commissioner of Railroads vs. Wabash Railroad Company, above referred to. No better answer can be made to the contention of the respondent than the language of the court in rendering its decision. It is as follows:

> "The question is, in determining what domestic fares shall be, is it competent to include the amount of interstate fares earned by that portion of the road lying within the State of Michigan? Without further discussion, we think this question must be answered in the affirmative. We think the case fairly within the principle laid down in Home Ins. Co. v. New York, 134 U. S. 594 (10 Sup. Ct. 593), and Maine v. Grand Trunk R. Co., 142 U. S. 217 (12 Sup. Ct. 121, 163). It is true that those were franchise taxes, imposed upon the right to do business in the State; but the principle enunciated is stated in the following language in Home Ins. Co. v. New York:
>
> 'The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows.'

So it seems fair and just that, in fixing the rate for domestic commerce, the earnings of the road in this State by its interstate commerce should be considered. We see no constitutional provision which is thereby violated. It is no interference with the rates which may be fixed by railroads on their interstate business." (126 Mich. 115.)

III.

A purchaser of a railroad on a mortgage foreclosure who incorporates under the general railroad law of Michigan must be held to have done so voluntarily, and a corporation thus created is bound to conform to the schedule of fares therein provided the same as a company incorporated thereunder to construct and operate a new road.

The argument of this brief has thus far proceeded upon the hypothesis that the case at bar is one of *voluntary* organization of a corporation in which the rights and burdens received and assumed and objected to are those expressed in the company's charter or incorporation law.

Appellant, however, claims that the fact that the organization in 1896 was a reincorporation, absolves it from the operation of the estoppel or waiver which would be implied in the case of an orginal organization. In other words we presume that the argument of the appellant will admit the fundamental proposition thus far advanced in this brief, but will deny its application to the case at bar, claiming a distinction between the waiver or estoppel arising from an original incorporation and that arising from a reincorporation.

To state respondent's proposition in the most direct form possible, it seems to be this, viz:

The original Grand Rapids and Indiana Rail*road* Company had the right under repeated adjudications of the

United States Supreme Court to object to the operation of the amendment of 1889 to the general railway law providing for a graduated reduction of passenger fares, if such operation deprived it of reasonable earnings. This right the appellant claims was a franchise right *inherent in the property* of the Grand Rapids & Indiana Rail*road* Company. The transfer of this property through mortgage foreclosure and sale and subsequent reorganization did not divest this property of this *inherent franchise right*, and hence the Grand Rapids & Indiana Railway Company by successorship of this franchise has not waived and cannot be held as having waived or as being estopped from invoking the protection of the Constitution of the United States against the operation of this amendment of 1889.

In view of the contention it seems advisable to direct the attention of the Court to a consideration of just what rights and franchises were vested in the appellant corporation by way of successorship when it was organized in 1896.

It is true that the Michigan statute provides that a railway comapny organized by a purchaser upon foreclosure sale under the provisions of the section of the general railway law quoted in the statement of facts, "*shall have the same rights, powers and privileges as are or may be secured to the original company.*" (See paragraph 4, statement of facts.)

It is also provided in the general railway law of Michigan that railway companies might be authorized "*to mortgage* their corporate property and *franchises.*"

The record in this case shows that the mortgage foreclosed did include in apt language "The franchises of the Grand Rapids & Indiana Railroad Company," and that these franchises were sold.

The question is whether "this right to contest the validity of the section fixing rates and charges as requiring the carrying of passengers at unreasonable rates," was a *franchise* of the original company or a *power* or *privilege* that under the law was transferred to the succeeding company.

Upon the question appellee advances the following:

1. The appellant can hardly make the claim that the franchise referred to as subject to the mortgage and which might be vested in a corporate successor included, "perogative" franchises, or the right to be and exist as a corporation. That such is not the intendment of the law is apparent from its terms.

Section 2 of Article I previously referred to in this brief, provides that in case of foreclosure under any mortgage, the purchaser may be permitted to organize a corporation for the management of the same. If the right to be a corporation or to acquire the life and being of, or authority to continue and control the operations of the corporation whose property was sold were franchises or rights that were carried to the purchaser on mortgage foreclosure sale, there would be no necessity in this act for the provision allowing to the purchaser the opportunity to change his individual or private ownership of the property to a corporate ownership.

That the right to be a corporation or the corporate organization and the power to control it, is not strictly speaking a corporate franchise is expressly ruled by various decisions.

Mr. Justice Manning, in a case before the Supreme Court of Alabama, Meyer v. Johnston, 53 Ala. 237, 325, uses the following language:

> "Strictly, 'the franchise to exist as a corporation' is not a corporate franchise, or 'franchise of the corporation,' at all. It is a franchise of the individual corporators, of the natural persons who are shareholders of the capital stock, and pertains to them as such corpo[illegible] whereby they are endowed with the privilege and capacity of being constituted into, and co-operating together as, a body politic, with power of succession, and without individual liability. And the corporation as such, in its collective capacity or by its board of directors has no more power to sell this franchise thus pertaining to the corporators individually than it has to sell their paid up shares of

the capital stock. The interest of each of these in this franchise is transferred with his shares of stock, and passes with them from one individual to another; and this is the proper mode of parting with and acquiring this particular privilege. A railroad company may continue to exist as a corporation after its railroad, with all of its appurtenances, has been sold away from it. There may be other property to dispose of, or credits to get in, or obligations to be discharged, or interests to be protected, which require its continued existence, and which may not belong to, or be chargeable upon, the persons who were purchasers of its railroad and the franchises necessary for the maintenance and operation of it. And on the other hand, those purchasers might not desire to be constituted into a corporation at all. Or, if they did, it might be very inconvenient to find themselves composing the same body politic whose property had just been sold to them for the payment of some of its debts. For it would seem that if with the railroad they acquired also the company's 'franchise to be a corporation,' with the same faculties and name, by virtue of and with which the former body existed, they acquired it to be assumed and used, and so must themselves become that corporation, and be bound to perform its obligations." (53 Ala. 325.)

In the case of Eldridge vs. Smith, 34 Vt. 484, 489, Chief Justice Poland makes the following statement in the decision of the case:

"It is said that one of the franchises of all corporations is the power of being a body politic, corporate existence, with rights of succession of members. Another is, its rights of representation in court by its corporate name, either as plaintiff or defendant. It has a general power, also, of acquiring, holding,

and conveying property. In addition to these general corporate powers, this company was invested by the legislature with a power to build a railroad between certain points, and to operate and manage the same, and take tolls and fares on the same for their own benefit and profit; and, to the extent of the proper necessities of the road, were authorized to exercise the sovereign power of the State, to sequester private property without the consent of the owners, by making compensation therefor. When a railroad company mortgages its road and appurtenances as a security for debt, and also its franchises, it is not to be understood as conveying its corporate existence, or its general corporate powers, but only the franchise necessary to make the conveyance productive and beneficial to the grantees, to maintain and support, manage and operate, the railroad, receive the tolls and profits thereof for their own benefit." (34 Vt. 489.)

2. It is apparent from the terms of the Michigan law that it was not intended that the reorganized company should have any franchise rights or powers or privileges which did not have their source in, or which were not held pursuant to the act under which the reorganizing company was incorporated.

The effect of the language of section 2 above quoted, viz: that the reorganization company, "shall have the same rights, powers and privileges as are or may be secured to the original company," is to vest in the succeeding corporation the property or contract rights, or choses in action of the preceding corporation, *with such powers of the old corporation as are conceded by the general railway law of the State under which the new company is organized.* The law as existant when the new company is organized is to be the measure of its corporate capacity. This is clearly indicated by the latter

part of section 2, which limits and restricts the language of the earlier part of the section previously quoted. That language is, that after the articles required by the section are filed and recorded, *"the said corporation shall become complete, with all the powers and rights secured to railroad companies, under this act, to all the provisions of which, and amendments thereto it shall be subject."* (Act 198, 1873.)

If on foreclosure sale, the property of the old company was purchased and thereafter held and operated by an individual, a trustee or an unincorporated association of individuals, there is no doubt but that he or they would succeed to such powers of the old corporation mortgaged as franchises, as would be necessary to utilize and operate the property. This proposition is treated later in this brief. But if he or they should subsequently incorporate under the general railroad law of the State, while the powers and the rights acquired under the incorporation might be identical in terms with those enjoyed by successorship from the old railway company under whose mortgage they have acquired title to the property, yet they would be new powers and obligations in the same sense that the right of a tenant who had obtained a new lease of premises held in occupancy, would trace their origin not to the old but to the new lease under which the holding is now had. While the two leases might be identical, the rights under the new lease could be due in no sense to the successorship of rights from the old, but authority would be found solely in the new grant.

3. The right to invoke the protection of the 14th amendment of the Constitution of the United States is not a franchise or right originating in laws permitting incorporation, and hence cannot be claimed to have been assigned or transferred by the operation of such laws.

The right to invoke the protection of this great charter is personal to each and every individual resident in the United States, and its operation has been held to apply in certain respects to corporations. By the very nature of the right it

is not subject to assignment. My rights to the equal protection of the laws would be no greater because some one else had been pleased to assign to me his rights. Nor would the assignment to me of the rights of another, if such could be done, save me from the operation of a waiver of those rights if my actions indicate such to have been my intent.

Certainly the appellant cannot with good face contend that the general railway law of Michigan conceded as a franchise to incorporators thereunder the right to contest its constitutionality. The claim that the right of the original corporation to raise the question of the reasonableness of the rates, necessitates the assumption that the legislature, in enacting section 2 above quoted, had in mind that unreasonable rates might be imposed, and therefore, gave to succeeding corporations the same power of raising the unreasonableness of these rates as its predecessor possessed. The assumption, in our judgment, is absurd. And yet the right claimed by appellant, must find its basis in this very assumption, when it claims the right to invoke the protection of the 14th amendment through successorship from the Grand Rapids & Indiana Railroad Company by the terms of the general railroad law of Michigan now under discussion.

If the right to raise the question of reasonableness of the rates fixed by the amendment of 1889 was a privilege personal to the original corporation it would seem as if the numerous authorities of this Court to the effect that exemptions and immunities from taxation deemed as personal to the corporation receiving the grant will not be held as having been transferred to another company by general language. The case of Chesapeake & Ohio Ry. Co. vs. Miller, 114 U. S. 181 is fairly illustrative of the application of the principle. In that case the plaintiff company had succeeded to the rights and privileges of a prior corporation under an act which provided, "The corporation created by or in consequence of such sale and conveyance *shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been had or should have been performed by the first*

company but for such sale and conveyance." It was there held that only those positive rights and privileges, without the possession of which the road of the company could not be successfully worked, were transferred, and that immunity from taxation, being a privilege personal to the original corporation, could not be succeeded to and possessed by the purchasing corporation in the absence of an express statutory direction to that effect.

See also Wilson vs. Gaines, 103 U. S. 417.

4. The purchaser on the foreclosure sale had ample powers to continue the operation of the property purchased under the franchise of the original company, and his incorporation under the general railway law of Michigan was a voluntary acceptance of the privileges of that act.

In the decision of the case at bar in the Supreme Court of Michigan, Justice Montgomery states the following:

> "May it not be said that the rights and property of this corporation vested in the purchaser upon the foreclosure sale, and that, independent of any express statutory authority to operate, the purchaser was authorized to maintain his property rights, and to operate this railroad in accordance with the franchise of the original company, and under precisely the same conditions?"
>
> See opinion in printed record, page 64.

While private ownership of railroads is not common, and while it may not have been the policy of the State to grant to individuals the powers which are ordinarily necessary for the construction, maintenance and operation of railroads, yet it is obvious that to inhibit individuals from bidding upon

railroad properties or from actually purchasing the same at foreclosure sale would operate as a serious and perhaps unpermissible abridgement of property rights. If under the laws and policy of the State of Michigan it is permissible, and we may certainly assume that it is so held by the highest court of the State of Michigan, as witness the excerpt from Justice Montgomery's opinion in this case,—for an individual, by purchase of the franchises of a railroad company in connection with its property, to thereafter operate the road in accordance with such franchise and under precisely the same conditions as if these franchises appertained to him as an individual instead of appertaining as previously to a corporation, wherein could he be said to suffer in his property rights if authority to incorporate was withheld from him. Or, on the other hand, if the privilege of incorporation upon terms was offered,—not forced upon him,—would he not have the opportunity to measure the advantages and disadvantages of the proffered organization with the privileges and burdens of the condition under the law in which he had voluntarily placed himself by the purchase of the property and franchises of an existing railroad? The opportunity of choice exists to the same extent and in the same manner as it would exist to individuals who should embark upon an entirely new railroad enterprise. The terms of incorporation are known. Those who would incorporate are free to accept or refuse. If they accept, the assumption of the burdens of the law is by their voluntary act and must be held forever after as a waiver of a right to complain against its terms.

5. A case that seems to be almost identical with the case at bar lately came before the Supreme Court of Mississippi.

> Alabama & Vicksburg Ry. Co. v. Odeneal, 73 Miss. 34, 39.

The Alabama & Vicksburg Ry. Company became the purchaser of the Vicksburg & Meridian Railroad Company under foreclosure sale ordered by a Federal court in 1889, and reorganized under the provisions of the act of the legislature of Mississippi, approved March 9, 1882 (Laws Miss. 1882, p. 47). An act of March 13, 1884, relative to farm crossings was then in force and had become an integral part of the law under which the reorganization was effected. Odeneal brought an action against the railroad company for the recovery of a penalty provided by the act, last mentioned, for failure to provide a suitable crossing over its tracks for a necessary plantation road to connect plaintiff's plantation. The railroad company contested the suit on the ground that its right of way antedated the act of March 13, 1884, and its road was constructed long before such legislation was contemplated and that it was unconstitutional to restrict its rights by such additional burden.

The Court, however, says:

> "The act of March 13, 1884, relative to farm crossings was then (at the time of reorganization) in force, and was therefore integrated into its charter upon organization and under said laws as a part thereof, *and appellant has, therefore, no standing to question the constitutionality of the legislative provisions touching such crossings.*" (73 Miss. 39.)

The above case would seem to lack nothing as authority upon the case here under consideration. The very fact upon which appellant most relies, viz.: that its incorporation was by way of reorganization and not original incorporation was a feature of the case cited, and all of the arguments that are advanced by appellant in this case might have been advanced in that case with equal pertinacity.

In the light of this analysis and particularly in view of the decision of the Supreme Court of Michigan upon the rights and authorities of an individual purchaser at mortgage

foreclosure sale of the property and franchises of a railroad company that had, under express statutory authority, mortgaged its franchises in connection with its property, it is difficult to see the force of appellant's argument that it is not bound to the terms of the act under which it was incorporated in exactly the same manner as if the incorporation was for the purpose of constructing a new road.

IV.

The judgement of the supreme court of Michigan in the case at bar was not based upon any federal question and this court is without jurisdiction to review it.

On the application of appellant to a member of this court for the granting of a writ of error a brief was presented urging the above proposition, and the appellee re-urges the same in this brief.

The case of Electric Company vs. Dow, 166 U. S. 489, and cases there cited would seem to be in point. The case has been previously referred to in this brief and its points of contention stated. Justice Shiras in winding up the opinion of the Court says:

> "The plaintiff in error accepted the powers and rights conferred by the act of 1868, and joined in the proceedings for the assessment of damages. It must therefore be deemed to have agreed that the damages should be assessed in the manner provided for in the act. *At all events the Supreme Court of the State has so decided, and as its judgment was not based on any Federal question we have no jurisdiction to review it.*" (166 U. S. 492.)

The cases cited in this opinion are as follows:

Clay vs. Smith, 3 Peters 411.
Beaupré vs. Noyes, 138 U. S. 397;
Eustis vs. Bolles, 150 U. S. 361.

In the case at bar, the answer of appellant admitted its incorporation in 1896, when the provision regarding the graduation and reduction of passenger fares was a part of the general railway law of the State. The demurrer of appellee raised the question of whether by its acceptance of the powers and rights conferred by the law through incorporation thereunder it must not be held to have agreed that its passenger charges should be according to the provisions of that act. The Michigan Supreme Court so decided. The view taken by the latter Court did not involve a Federal question. It is broad enough in itself to support the final judgment without reference to the Federal question sought to be raised by appellant.

It is submitted that without regard to the other consideration presented in this brief, that this point should cause the dismissal of the writ.

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HORACE M. OREN,
Of Counsel.

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FILE COPY.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 61.

Office Supreme Court U.S.
FILED
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JAMES H. McKENNEY,
Clerk.

THE GRAND RAPIDS & INDIANA RAILWAY COMPANY,
Plaintiff in Error,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN,
Defendant in Error.

ADDITIONAL BRIEF ON BEHALF OF DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

CHARLES A. BLAIR.
Attorney General of Michigan,

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ADDITIONAL BRIEF ON BEHALF OF DEFENDANT IN ERROR.

General Statement of Issues Presented.

The sole questions presented in this case are those raised by the demurrer to the respondent's answer, and those incidentally determined by the State Supreme Court, in sustaining the demurrer.

The demurrer filed, as amended pursuant to the order of the State Court (Record, p. 65) sets forth two grounds of demurrer, as follows:

> "*1.* That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which was and is the agreement on the part of said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine of article two of said general railroad law, under which it is incorporated.
>
> "*2.* That upon its incorporation in 1896 under the general railroad law, the said respondent became subject to that law and the provision therein requiring it to carry passengers at the rates fixed in subdivision ninth, section nine of article two of that law, said provision in regard to rates being one of the conditions of the existence of respondent." (57.)

If the decision of the State Court is affirmed and the demurrer sustained, the respondent and plaintiff in error is required to carry at the statutory rate, which is being complied with by numerous other railroad companies, existing and doing business under conditions no more favorable than is the respondent.

If, on the contrary, the decision of the State Court and the demurrer are overruled, the case must be remanded for a determination as to the reasonableness of the rate fixed, unless it be determined that the statute as construed by the State Court is invalid, in including in the basis for the determination of the rate a portion of the interstate fares, or in not providing for a judicial determination of the reasonableness of the rate fixed, or is invalid as being a conclusive and final determination of a reasonable maximum rate.

POINTS.

I.

The state decision and its effect.

The State Court, in its opinion sustaining the demurrer in this case, passes upon and settles the Michigan law in the following particulars:

(*a*) That the respondent and plaintiff in error, by incorporating under the general railroad law, became and is subject thereto, and will not be heard to question the rates fixed by the statute. (Record, p. 63.)

(*b*) That the organization of the respondent and plaintiff in error under the general railroad law, so-called, of the State of Michigan, after acquiring by foreclosure, the rights and property of a previously existing railroad corporation, was made subject to all the provisions of the statute of incorporation, as previously amended, and as it at that time existed.

(*c*) That the same right to question the reasonableness of the rates fixed in the statute of incorporation which was possessed by its predecessor was not, by the terms of the statute, transferred to and did not become one of the rights of the respondent and plaintiff in error.

(*d*) That the provision of the general railroad law (§ 2, Art. 1, Act 198, 1873,—6225, C. L. 1897), giving to purchasers upon foreclosure the right to organize a corporation, was a matter of general law, and did not, upon the issuance of bonds, become a part of the contract with the bondholders.

(*e*) That the purchaser upon foreclosure could maintain his property rights and operate the railroad in this State, in accordance with the franchise of, and under precisely the same conditions as, the original company, without becoming a corporation.

The State Supreme Court, in reaching these conclusions, passed upon, not Federal questions, nor questions of a gen-

eral commercial character, but upon questions of purely local Michigan law, involving the construction of the State statute and the application of the principles of the Michigan common law. The decision of a State Court, upon questions of this character, has always been regarded by this court as conclusive and binding upon it.

Luther v. Borden, 7 How. 40;
Bucher v. Cheshire R. Co., 125 U. S. 555;
Pittsburg, etc., R. Co. v. Backus, 154 U. S. 421;
McElvaine v. Brush, 142 U. S. 155;
Miller's Exrs. v. Swann, 150 U. S. 132.

In cases of this character, this court determines, not what the Michigan law is, or what effect is to be given to it, but as to whether it, as construed, applied and given effect by the State Court, violates any of the principles of the Federal constitution.

Northern Central Railway Company v. Maryland, 187 U. S. 258, 261.

II.

Effect of incorporation of respondent.

A corporation is subect to, and cannot question the validity of, the statute under which it has voluntarily incorporated. This rule has been repeatedly stated and applied by this court.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 512, 513, (161 U. S. 703);
Reagan v. Farmers' Loan and Trust Company, 154 U. S. 362, 409, 411;
Ashley v. Ryan, 153 U. S. 436, 443.

In *Louisville & N. R. Co.* v. *Kentucky*, the constitution of the State of Kentucky contained a provision prohibiting companies from charging more for a shorter than for a longer haul, with certain exceptions. The railroad company, being subsequently incorporated, objected to this provision, as depriving it of constitutional rights. The court held the railroad company, by its incorporation, to have accepted the constitutional provision and to be subject thereto, without authority to question its validity, saying:

> "It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the State to define their powers and to control their exercise of such powers. The question for us, in the present case, is whether the State, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the Constitution and statutes, deprives the plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws.
>
> "When the citizens of Kentucky voluntarily seek and obtain a grant from the State of a charter to build and maintain a public highway in the form of a railroad, it would seem to be evident that it takes, holds and operates its road subject to the constitutional inhibition we are considering, and are without power to to challenge its validity. It may be that in a given case a railroad company may be able to show that the State has disabled itself from enforcing the provision by a contract previously made, and it may be that cases may arise in which the provision cannot be enforced because operating as an unlawful interference with commerce between the States. Indeed, those very positions are taken by the plaintiff in error in this

case, and will receive our attention hereafter. But apart from such contentions, and looking only at the case of a company voluntarily formed to carry on business wholly within a State, we are unable to see how such company can successfully contend that it can be exempted by the courts from the operation of the Constitution of the State. * * * As already said, the railroad company must be deemed to have accepted its grant, subject to the provisions of the Constitution, and this presumption is as applicable to the method provided for exoneration from the prohibition as to the prohibition itself.

"We do not put the disability of the company to raise these questions upon the ground of an estoppel, strictly speaking, but upon the proposition that the company takes and holds its franchises and property subject to the conditions and limitations imposed by the State in its Constitution. Munn v. Illinois, 94 U. S. 113; Davidson v. New Orleans, 93 U. S. 97; Railroad Commission Cases, 116 U. S. 307." (183 U. S. 512-513, 516.)

III.

The action of the State does not impair the obligation of contract.

If any Federal question is raised by the demurrer upon this record, it is that the State has disturbed contract rights by refusing the purchasers upon foreclosure the right to organize a corporation, under the law as it existed at the time the foreclosed mortgage of 1884 was given and bonds issued, without the addition of new conditions. If this Federal question is raised, it is without merit, being expressly covered by the decisions of this court.

The decision of the Supreme Court fixes the status of the

statute permitting the respondent, and plaintiff in error, to incorporate as the purchaser upon foreclosure of the mortgages given by its predecessor, and determines its right thereunder. Did the statute existing at the time that the mortgages were given (1884) constitute a part of a contract between the State and the bondholders or purchasers upon foreclosure to the effect that the bondholders or purchasers should have the right to reincorporate under the statute in practically the same terms as it existed at the time the mortgage was given, and did the change in the statute, by reducing the rate of fare allowed to be charged to such an extent as to be insufficient to pay a return upon the investment, operate to impair the conditions of that contract and to deprive the bondholders of their property without due process of law. There is considerable force in the contention of respondent, if, as a matter of law, it was guaranteed the right to incorporate under as favorable conditions as existed at the time the mortgages were given; but the right of the purchaser upon foreclosure to reincorporate was a matter of statute—a matter of general law, within the authority of the legislature to alter or change at any time, and which did not enter into and become a part of the contract between the mortgagor and the bondholders, or between the State and the mortgagor and bondholders. This point is clearly illustrated in the cases of *Schurz v. Cook,* (148 U. S. 397), and *Memphis & Little Rock R. R. Co. v. Commissioners,* (112 U. S. 609). In *Schurz v. Cook,* a certain railroad company executed a mortgage upon its property and franchises to secure the payment of bonds issued by it, at which time there existed a statute permitting the purchasers upon foreclosure of railroad property and franchises, to become a body politic and corporate, and as such, to take, hold and possess the title and property included in said sale and all the franchise right, powers, privileges and immunities which were possessed before such sale by the corporation whose property was sold. Default was made in the payment of the bonds, and foreclosure had; the purchasers presented to the Secretary of State, for filing, the

certificate required by the statute. The Secretary of State refused to receive the same without the payment of a franchise fee, under a statute enacted since the giving of the mortgage. The purchasers insisted upon the right to reorganize under the statute as it existed at the time the mortgages were given, without the imposition of new conditions, and that that statute constituted a contract between the bondholders and the State. The court, in disposing of the question, says that in many, if not most, acts of incorporation there are various provisions which are matters of general law and not of contract, and that such is the character of the right in mortgage bondholders or purchasers at a sale under the mortgage to organize as a corporation, after acquiring the title to the mortgaged property, and the statute should be construed as conferring only a right to organize as a corporation according to such laws as might be in force at the time when the actual organization takes place, saying:

> "It cannot, we think, be admitted that a statutory provision for becoming a corporation *in futuro* can become a contract, in that sense of the clause of the Constitution of the United States which prohibits State legislation impairing its obligation, until it has become vested as a right by an actual organization under it; and then it takes effect, as of that date and subject to such laws as may then be in force. * * * They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment." P. 619. "All the franchises necesasry or important to the beneficial use of the railroad could as well be exercised by natural persons. But it is urged by plaintiffs in error that, under the decisions of the highest court of New York, they cannot, as private persons or as an association, so use, maintain and operate the railroad which

they have purchased. Without reviewing the New York cases cited in support of this position, we doubt whether they go to that extent. But if they so held under any law of the State passed since the execution of the mortgages under which plaintiffs in error have succeeded to the properties and franchises of the railroad sold under foreclosure, as already mentioned, *then* the question would be whether the impairment of the obligation of the contract would not consist in *denying* the purchasers the right to use the property and franchises so acquired. The fact, if it exists, that plaintiffs in error are not allowed to operate the railroad and exercise the franchises purchased without first obtaining corporate existence, in no way shows or tends to establish their contention, that said act of 1874, as amended in 1876, constituted a contract on the part of the State to confer corporate capacity upon them without imposing any tax as a prerequisite to the grant of corporate existence. * * * There is no provision of the law under which they made their purchase requiring them to become incorporated, but, desiring corporate capacity, they demanded the grant of a new charter under which to exercise the franchises so acquired, without compliance with the law of the State existing at the time their application for incorporation was made. We are clearly of the opinion that the act of 1874, as amended in 1876, set up and relied upon by them, does not sustain such a claim. The provisions of that act do not constitute a contract on the part of the State with either the corporations, or the mortgagees, bondholders or purchasers at foreclosure sale. They are merely matters of law instead of contract, and the right therein conferred upon purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon to reorganize and become a *new corporation*, is subject to the laws of the State existing or in force at the time of such

reorganization and the grant of a new charter of incorporation." (408, 409, 410.)

If the points raised in the demurrer are well taken, this disposes of the case, and those points must be held to be well taken and the decision of the State Supreme Court in regard thereto final, unless the State was without the right to attach conditions to the right of the purchasers on foreclosure to reorganize, after the giving of the mortgage.

If the demurrer be overruled, the questions of whether the act violates the interstate commerce clause of the Federal constitution, or, by reason of being held by the State Court, in the case of Wellman v. Chicago & Grand Trunk R. Co., 83 Mich. 592, to be a final and conclusive declaration of a reasonable maximum rate, without judicial authority to interfere, or by reason of making no provision for a judicial determination of the question of reasonableness, deprives respondent of its property rights, become material, and those questions will be briefly discussed.

IV.

Interstate Commerce is not, directly or indirectly, interfered with.

The statute, in its operation, is limited to commerce between points entirely within the State. It has been so limited by the State Court, (Commissioner of Railroads v. Wabash Railroad Company, 126 Mich. 115), and this court will follow that construction and so limit it to give it a constitutional operation.

It may be said, however, that the rate for the local fare is fixed by a reference to the interstate fare, including such a portion of the interstate fare as the distance carried in Michigan bears to the entire distance carried. This does not affect, either directly or indirectly, the interstate fare. The

railroad company charges such interstate fare as it sees fit, subject to the limitations prescribed by Congress and the Interstate Commerce Commission; but when the intra-state fares and the proportion of the interstate fares earned in Michigan reach the amount fixed by the statute,—in this case, two thousand dollars per mile,—the railroad company is required to carry at a fixed rate,—in this case, two and one-half cents per mile. The interstate rate is referred to and included, not for the purpose of affecting it, but solely and exclusively as a basis of classification, and nothing more. The rule results, from the decisions of this court in *Home Life Insurance Co. v. New York* (134 U. S. 594), and *Maine v. Grand Trunk Railroad Company* (142 U. S. 217), that the mode of measurement to be prescribed by a legislative body, when legislating with regard to matters within its jurisdiction, in fixing the amount of a tax, or in fixing a maximum rate of charge, is not open to constitutional objection.

It will be noted that, in this case

(*a*) A reference to the interstate receipts is not for the purpose of affecting any rate, either interstate or local, but is for the purpose of fixing a classification, and when this classification is fixed, a certain, prescribed statutory rate becomes applicable; and

(*b*) The classification is made, not upon future receipts or with the purpose or intent of affecting future receipts or interstate fares, but upon past business and receipts, and with the purpose of affecting, in the future, only the intra-state or local fares.

In these particulars, the case is distinguished from that of *Louisville & N. R. Co. v. Eubank* (184 U. S. 27), where the statute of the State of Kentucky, in so far as it prohibited a greater charge for a short haul entirely within the State of Kentucky, than for a longer haul in the State of Kentucky and another State or States, was declared unconstitutional. In that case, while it was held that the State had no right to fix its local rate with reference to an existing interstate rate

fixed by the carrier itself, it was said that it might fix the local rate by a reference to the interstate rates prescribed by Congress or the Interstate Commerce Commission, and "enact that the road should not charge more nor at a greater rate for a short haul within the State than Congress provided for the long interstate haul. The reason is that Congress in the case presented is assumed to have the power to direct and regulate the interstate rate, and having that power and exercising it the State could then provide that its internal charge should not exceed that rate, and there would be in that case no interference with or regulation of interstate commerce directly or indirectly by the State, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists." (41.)

In this case, the classification is made and the rate fixed simply by reference to a past transaction, and the fixing of the local rate can have no influence upon, or affect, future interstate transportation.

V.

The statute, fixing the maximum rate of charge is not unconstitutional because declared by the State Supreme Court to be conclusive upon the courts and to allow no judicial investigation as to the reasonableness of the rates fixed.

(*a*) Was the question of whether this statute was or was not conclusive, before the Supreme Court in the case of *Wellman v. Chicago & Grand Trunk R. Co.* (83 Mich. 592)? If that question was not involved in the case, it forms no part of the decision, though the court, in passing, may have adverted to, and seemed to decide, it. The question involved in that case was whether the circuit judge erred in refusing to instruct the jury that the act was unconstitutional. That

was the only question in the case, as is indicated in the opinion of the Supreme Court of the United States in *Chicago & Grand Trunk Ry. Co. v. Wellman,* where, upon the same record as presented to the State Court, it was said: "The single question presented on the record is, whether the trial court, on the facts presented, erred in refusing to instruct, as a matter of law, that the act of 1889 was unconstitutional." (143 U. S. 339, 342.)

(*b*) Assuming that the question claimed to have been decided in *Wellman v. Chicago & Grand Trunk Ry. Co.* was involved in the case, and that the court did there decide that the courts had no authority to inquire into the reasonableness of the rates fixed, it does not follow that the case presented is identical to that presented to the Supreme Court in the case of *Chicago, etc., R. Co. v. Minnesota* (134 U. S. 418). The case presented to the Federal Supreme Court there, and the case of *Wellman v. Chicago & Grand Trunk Ry. Co.,* are very clearly distinguishable. In the case presented in *Chicago, etc., R. Co. v. Minnesota,* the Supreme Court of the State of Minnesota held that the legislature intended that the act should be final and conclusive as to the reasonableness of the rates prescribed, and that the act was final and conclusive. The question decided by the Supreme Court of Minnesota was the construction to be placed upon its own statute, upon which the judgment of the State Court is always final and not reviewable by the Federal Courts. The construction placed upon its act by the Supreme Court of the State of Minnesota was such as gave it an unconstitutional operation; and as the Federal Courts were obliged to follow the State Court in that construction, it was absolutely necessary that either the statute, or the action of the State Court, should be declared unconstitutional.

In the *Wellman* case, although both a constitutional provision and a statute were under discussion, the question decided was not purely one of statutory construction, but was the enunciation of general principles based upon the State

Court's understanding of the reasoning in the Federal cases of *Munn v. Illinois; Chicago, etc., R. Co. v. Minnesota,* and others. That being the case, the decision of the State Court would not be regarded as final and unreviewable, either in that court or in the Federal Court; and instead of saying that the statute was invalid because given a conclusive effect by the State Court, the Federal Court would investigate for itself to determine whether or not it was within the authority of the courts to make inquiry as to the reasonableness of the rates established.

Venice v. Murdock, 92 U. S. 494;
Genoa v. Woodruff, Id. 502;
Michigan Central R. Co. v. Myrick, 107 U. S. 102;
Clark v. Bever, 139 U. S. 96;
Norton v. Shelby County, 118 U. S. 425.

In *Clark v. Bever,* the Federal Supreme Court, in deciding that certain decisions of a State Court were reviewable, said: "The decisions of the State Court are not, therefore, to be regarded as resting upon the local statute, but only as expressing the views of that tribunal in respect to the same principles of general law announced by this court, after the fullest consideration, in the numerous cases to which we have adverted. * * * We cannot, consistently with our deliberate judgment upon this question of general law, accept the decision in Jackson v. Traer as controlling the determination of the present case." (139 U. S. 116, 117.)

This decision has been recognized by the Federal Supreme Court in passing upon the very questions which we are now discussing. In *Chicago, etc., R. Co. v. Minnesota* (134 U. S. 418) it refused to interfere with the construction by a State of its own statute. In *Chicago & Grand Trunk Ry Co. v. Wellman* (143 U. S. 339), it did review the question passed upon by the State Court. Had it regarded the case of *Chicago, etc., R. Co. v. Minnesota* as furnishing the criterion for the determination of the question here presented, it would

have had no other alternative in the case *Chicago & Grand Trunk v. Wellman* presented to it than to have declared the Michigan statute unconstitutional. But it did not do so. On the contrary, it held that the presumption was in favor of the constitutionality of the act, and overruled the decision of the State Court (114 Mich. 476), saying: "The extent of judicial interference is protection against unreasonable rates," (344), and holding also that the circuit judge did not err in refusing to instruct that the act was unconstitutional.

Cases which are identical in effect with this case, are those of *Reagan v. Farmers' Loan & Trust Co.* (154 U. S. 397), and *Southern Pacific R. Co. v. Board of Railway Commissioners* (78 Fed. 236). In both of these cases the statute contained a provision that the rates fixed by the commission should be final and conclusive. This court, in the one case, and Judge McKenna, in the other, held that this statutory provision was void, and did not affect the validity of the remainder of the act. In this case, instead of the provision, in regard to the rates being conclusive, being enacted by the legislature, it is incorporated by the courts by reason of a misapprehension of certain Federal cases. The authority exists in the Federal Courts in either case to declare the provision unconstitutional, and thus give the statute a constitutional operation. The analogy of these cases to the case at bar is evident.

(*c*) Though the decision of the State Supreme Court gives the State statute an unconstitutional operation, the questions presented in that decision are subject to a reconsideration, and when the decision is altered so far as is necessary to effect a constitutional operation, the statute will be valid. In other words, it may be regarded as the action of the courts in preventing or refusing an investigation as to the reasonableness of the rates fixed and not the statute fixing the rates, which is unconstitutional. This view was evidently taken in the cases of *Chicago, etc., R. Co. v. Minnesota* (134 U. S. 418), and *Covington, etc., Turnpike Co. v. Sanford* (164 U. S.

578). In the former of those cases it was said: "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. (456, 457.) * * * The issuing of the peremptory writ of mandamus in this case was, therefore, unlawful, because in violation of the Constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the Supreme Court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court. In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review." (134 U. S. 458, 459.) By this language the court intended that the Supreme Court of Minnesota might alter its decision, investigate the reasonableness of the rates prescribed by its statute, and by so giving it a constitutional operation, render it a valid statute. That this was so, is evidenced by the view which is taken by Judge McKenna in his opinion in *Southern Pacific R. Co. v. Board of Railway Commissioners* (78 Fed. 259), where, after quoting the above language of Justice Blatchford, he said: "The question could not be open for review if there was an antecedent defect in the creation of the commission which rendered any exertion of duties invalid, because the statute creating it had not provided for notice to the railroads affected by such exertion of duties."

VI.

The statute is not void by reason of not providing for a judicial investigation as to the reasonableness of the rates fixed.

The power is inherent in the judiciary to inquire into the reasonableness of rates of charge fixed by the legislature, and it is not necessary that that power be conferred and the machinery therefor provided by statutory enactment. Without statutory authority, the courts have power to inquire into the constitutionality of enactments of the legislature. The enactment of the legislature in regard to rates depends, ordinarily, for its validity, upon the reasonableness of the rate fixed, and it is not within the authority of that body to oust the judiciary from jurisdiction over the question by a neglect to provide that an inquiry be made.

The courts have universally conducted inquiries into the reasonableness of maximum rates of charge permitted to public service corporations, and have given relief against unreasonable rates, regardless of the fact that the legislature omitted to make provision for inquiry into the reasonableness of the rate fixed, and the authority to do so is regarded as a judicial function. The inquiry into the reasonableness of the rates may be made upon a bill filed to restrain the collection of penalties, or to restrain enforcement of the statute, or may be raised by the carrier in an action to recover penalties, or in a mandamus proceeding to compel compliance with the provisions of the statute, or upon the filing of a bill to restrain the carrier from charging an excessive rate. See concurring opinion of Mr. Justice Miller, in *Chicago, etc., R. R. Co. v. Minnesota* (134 U. S. 460), and *St. Louis & S. F. R. Co. v. Gill* (156 U. S. 649).

In numerous cases, statutes fixing a rate of charge have been declared to be constitutional, although containing no provision for judicial investigation as to the reasonableness of

the rate, or giving the carrier an opportunity to be heard in regard thereto.

Budd v. New York, 143 U. S. 517;
Brass v. North Dakota, 153 U. S. 391;
San Diego Land, etc., Co. v. National City, 174 U. S. 739;
St. Louis & San Francisco R. Co. v. Gill, 156 U. S. 649.

VII.

The burden of the argument of respondent and plaintiff in error is that the enforcement against it of the rate fixed by the statute will deprive it of property without due process of law, and it cites a large number of cases to indicate the protection which the Federal constitution affords to property, that unreasonable rates cannot be established by a statute, and if established, will be relieved against by the courts.

We admit the correctness of the rule laid down by these cases; but insist that they are not applicable to a case where the rate fixed is established by the organic law of the corporation objecting, and constituted a part of that law at the time the corporation was organized. In such a case, the corporation, in order to gain any existence, was obliged to submit to the conditions imposed in the act creating it, and can possess only such rights and powers, and hold them subject to such conditions and limitations, as are fixed by that law. By accepting the provisions of the statute, the corporation, in substance, contracted to carry passengers at the rate fixed in the statute, and that it may have made a contract which it is not to its advantage to carry out, does not relieve it from the burden imposed by the statute.

The respondent also comments upon the fact that the two and one-half cent rate did not become effective until the earnings of the road reached two thousand dollars per mile, and

that the reasonableness of the rate must be determined as of that time. The entire provision relating to the graduated rate was in the law when the respondent incorporated under it, and it contracted, not only that it would presently carry at three cents, but that it would carry at two and one-half cents, when its earnings reached two thousand dollars per mile, and at two cents when its earnings reached three thousand dollars per mile. These conditions it submitted to upon its organization, although the circumstances bringing the particular rate into effect might not exist for a considerable period thereafter.

VIII.

The classification made in the Michigan act, by fixing a graduated rate, based upon earnings per mile, has been passed upon by this court and held valid, in *Chicago & Grand Trunk R. R. Co. v. Wellman* (143 U. S. 339; 83 Mich. 606).

See also,

Railroad Company v. Iowa, 94 U. S. 155;
Dow v. Biedelman, 125 U. S. 680;
Clark v. Titusville, 183 U. S. 329.

We submit, therefore, that the ruling of the State Supreme Court should be affirmed.

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